No. 81210-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

vs.

JASON LEE FRY,

Petitioner.

BRIEF OF PETITIONER (Supplemental)

William Edelblute

Attorney for Petitoner

300

N. Argonne Ste. 203

Spokane Valley WA 99212-

2839

Ph:

509-928-3711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Constitution

Washington Constitution

Statutes

1. The Court of Appeals reliance on *McBride* was misplaced

a. ***McBride* is distinguishable**

In this case, the police were aware of Mr. Fry's possession of a written medical authorization from his physician, prior to obtaining a search warrant.

The Court of Appeals accepted the excuse of the State, that under *McBride v. Walla Walla County*, 95 Wn.App. 33, 40, 975 P.2d 1029, 990 P.2d 967 (1999), an "affirmative defense" does not negate probable cause. Thus, the Court of Appeals in this case has issued a Published Opinion meaning that written medical documentation from a physician is of no import whatsoever in determining whether

a crime has been committed.

The net affect is that if an officer smells marijuana, then there is probable cause for a search, even if the officer has been shown a written medical authorization for use of medical marijuana prior to commencing the search. The practical results are that a patient properly using marijuana for medical purposes has his supply of medical marijuana, needed for treatment of terminal or debilitating illness, taken from him or her until any trial from any charges is concluded. Even were the patient acquitted, nothing would stop the process from ensuing again, since there still would be probable cause the next time the police smelled marijuana, or saw marijuana, associated with the patient's person or home.

The logic of *McBride* is stretched too thin when applied to the facts of this case. The Court of Appeals assumes the courts are unable to distinguish between the situation where there is probable cause for assault, but the suspect claims self-defense, and the officer has little in the way of a mechanism to determine if the suspect is

telling the truth or not, and the situation here, with a written authorization from a physician for use of medical marijuana.

In the situation here, the suspect possessed a written document signed by a physician, in compliance with a statutory framework enacted by the citizens of the State of Washington with the intent of allowing certain patients to ease their symptoms through the use of medical marijuana. To allow their medical marijuana to be seized and made unavailable to them for what can be a lengthy period of time, defeats the intent of the Washington State Medical Use of Marijuana Act, RCW Chap. 69.51A.

In *McBride*, the arrest of a suspect who claimed self-defense when accused of assault, did not defeat the intent of the law that defense of self is defense to assault. That person was not convicted of assault. And he had been allowed to exercise his right of self-defense, not merely assert it at trial as a defense.

In the case of possession of marijuana, being acquitted at trial does not avail the primary purpose of the Medical Marijuana legislation to the accused. Even an accused who prevails at trial had

not received the benefit of the initiative, as he or she had not been allowed to use their medical marijuana free of government intrusion, and may very well have been completely deprived of it.

The decision in *McBride* was made in a civil lawsuit, not in a criminal case.

The facts in *McBride* were that the two teenage sons of the McBrides had arrived home from a party, and a quarrel ensued. Their father, Mr. McBride, had confronted one of them and told him of them to calm down. Instead, his son became more enraged and began shoving and pushing Mr. McBride. Bryan threw two punches at his father. To protect himself from Bryan's third punch, Mr. McBride swung back and hit him in the jaw. *McBride*, 95 Wn. App. at 35.

Because Bryan was injured, the McBrides took him to the hospital.

At the hospital, Bryan was sedated and unable to talk. A nurse asked Mr. McBride what happened. He told her and she contacted the police. Deputy Sheriff Gary Bolster responded to

the call. He took a statement from the McBrides. The deputy then arrested Mr. McBride for fourth degree assault/domestic violence.

Mr. McBride spent one night in the Walla Walla jail and was released the next morning without bail. Eight days later, the charge against Mr. McBride was dismissed "because further review of the case and discussion with Deputy Bolster indicates a self-defense case." *McBride* 95 Wn. App. at 35. The McBrides sued for false arrest and for violation of civil rights under 42 U.S.C. §1983. The trial court granted summary judgment to the County of Walla Walla, reasoning that it was not up to the arresting officer to determine whether self defense applied, that the prosecutor could make that determination, but not the officer "particularly in view of the mandate of 10.31.100." *McBride*, 95 Wn. App. at 36.

The Court of Appeals in *McBride* discussed that fact that Officer Bolster arrested Mr. McBride pursuant to RCW 10.31.100(2)(b), the domestic violence section. If the officer

responding to a domestic violence call "has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers with reference to the criteria in RCW 10.31.100." RCW 10.99.030(6)(a). Accordingly, a police officer must take a suspect into custody if the officer believes the suspect committed an assault against a family or household member. RCW 10.31.100(2)(b). *McBride*, 95 Wn. App. at 38-39.

So *McBride* can be distinguished by the fact that it involved an arrest, not a search, and by the fact the arrest was mandated by RCW 10.31.100.

The officer responding to a domestic violence situation is presented with a choice of protecting the physical safety of someone, or potentially violating a statutory duty. There should be no such need for a rush to judgment when it comes to a search for marijuana,

as there may be a concern for destruction of evidence, but not specifically for the physical safety of a domestic violence

victim.

> [W]here an officer has legal grounds to make an arrest he has considerable discretion to do so. In regard to domestic violence, the rule is the reverse. If the officer has legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest.
>
> *Jacques v. Sharp,* 83 Wn. App. 532, 543-44, 922 P.2d 145 (1996) (quoting *Donaldson v. City of Seattle,* 65 Wn. App. 661, 670, 831 P.2d 1098 (1992), *review dismissed*, 120 Wn.2d 1031, 847 P.2d 481 (1993)).
>
> *McBride*, 95 Wn.App. at 39.

The language quoted above indicates that there is a huge difference between the reasoning of the Court of Appeals in *McBride* and the reasoning of the Court of Appeals in this case, which ignored that *McBride* must be properly limited to mandatory domestic violence arrests.

McBride does not provide binding authority that the medical documentation here can simply be ignored merely because it is an "affirmative defense" to a marijuana charge.

The factual distinction goes to the nature of the evidence available in the two different situations. Here, we have the written documentation. In *McBride*:

> Moreover, Officer Bolster was unable to speak with

> Bryan at the time of the arrest. He only had one side of the story. Mr. McBride's claim of self-defense was then a **mere assertion**, not fact. *McBride*, 95 Wn. App. at 40.

It is submitted that the existence of a written medical authorization is more than the "mere assertion" in *McBride*, where the officer had not witnessed the incident, and was able to speak to only of the people involved at the time of the arrest.

This Court should overrule *McBride*, or alternatively, hold that it does not apply to the situation where a written medical marijuana authorization is presented.

b. **Effect of the 2007 Amendment to RCW 69.51A.040**

To allow a search on the facts here would be to simply thwart the intent of the Medical Use of Marijuana Act. It makes no sense that the written authorization would be a "defense" yet then have it be legal for all of the medical marijuana seized anytime an officer smells it. To hold that the "affirmative defense" provision in the statute legalizes the seizure here would make that part of the statute at odds with

the overall purpose of the statute to allow qualified patients to alleviate their symptoms. All provisions of an act must be considered in their relation to each other and, if possible, harmonized to ensure proper construction for each provision. *Tommy P. v. Board of Cy. Comm'r's of Spokane Cy.,* 97 Wn.2d 385, 645 P.2d 697 (1982).

Subsequent to the search and seizure in this case, the following language was added in 2007 to the statute:

> 1) If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance.
>
> RCW 69.51A.040 as amended by Laws 2007, ch. 371, § 5

The entire sequence of statutes enacted by the same legislative authority relating to a given subject must be considered in determining legislative purpose. *In re the Marriage of Little,* 96 Wn.2d 183, 634 P.2d 498 (1981); *State*

ex rel. Chesterley v. Superior Ct for Yakima Cy., 19 Wn.2d 791, 144 P.2d 916 (1944); *Longview Co. v. Lynn,* 6 Wn.2d 507, 108 P.2d 365 (1940) (holding that not only prior but subsequent statutes may be considered for this purpose). The Court may consider the provisions of a later amendment in determining the legislative intent in the original enactment. *Longview Co. v. Lynn,* 6 Wn.2d at 520.

Therefore, the 2007 amendment to RCW 69.51A.040, which in sub-part 1), provides that the officer shall only take a sample, it evidence that the original intent of the statute, was not to allow all of a patient's marijuana supply to be taken any time there is probable cause for mere possession of marijuana.

Since the later enactment retained the former substantive provisions and simply provided a procedural mechanism, which was lacking in the original enactment, one might successfully argue that the amendment applies retroactively. *State v. Rodriguez,* 61 Wn. App. 812, 812 P.2d 868, *review*

denied, 118 Wn.2d 1006 (1991).

> [W]here this court has not previously interpreted the statute to mean something different and where the original enactment was ambiguous such to generate dispute as to what the legislature intended, the subsequent amendment shall be effective from the date of the original act, even in the absence of a provision for retroactivity.(Citations omitted.)
>
> *Overton v. Economic Assistance Auth.,* 96 Wn.2d 552, 558, 637 P.2d 652 (1981)

In *State v. Joswick,* 71 Wn. App. 311, 313, 858 P.2d 280, 281 (1993) Joswick claimed self defense applied to charges against him which were dismissed without a trial. He thereafter sought reimbursement for loss of time and expenses under RCW 9.01.200, recodified and amended as RCW 9A.16.110. The original statute did not clearly indicate that such reimbursement required acquittal, but the amendment, made after the charges were filed, did make it clear that it applied only to where there had been an acquittal.

The Court of Appeals stopped short of retroactive application, but looked to the amendment to clarify the original meaning of the statute:

> As demonstrated by the arguments presented by the respective parties in this appeal, the original enactment was ambiguous and raised doubts as to the intent of the Legislature. Furthermore, no judicial interpretation as to legislative intent on the precise issue raised here, intervened between the original enactment and the later amendment. From a reading of the amendment, it is obvious that the Legislature intended that before one is entitled to reimbursement for loss of time and expenses there must first be an acquittal in the criminal proceedings. *Joswick*, 71 Wn. App. at 316.

This Court should reverse the Court of Appeals, and hold that there was no probable cause for the issuance of a warrant for the search of the Petitioner's home. And, accordingly order the suppression of the evidence seized.

c. **The Constitution trumps *McBride* in Medical Marijuana cases**

Whether there is probable cause to believe a crime had occurred should not depend simply on whether a potential "affirmative

defense" exists or not.

First of all, simply applying the traditional test for probable cause, under the facts of this case, renders such a test unnecessary. A search warrant may issue only upon a determination of probable cause. *State v. Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A search warrant may issue only upon a determination of probable cause. *State v. Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). To establish probable cause,

the affidavit for a search warrant "must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity." *State v. Cord,* 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985).

A reasonably prudent officer, confronted only with a) the smell of marijuana, and b) a written medical authorization for use of marijuana, would not have reasonable grounds to believe a crime has been committed.

Secondly, the language of the Washington Const., art. 1, sec 7 does not permit such a rigid test in this case.

The Washington Constitution provides that, "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, §7.

Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. Surge*, 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007).

We begin by determining whether the action complained of constitutes a disturbance of one's private affairs. If there is no private affair being disturbed, no article I, section 7 violation exists. If a valid privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. In general terms, the "authority of law" required by article I, section 7 is satisfied by a valid warrant. However, the protections of article I, section 7 and the authority of law inquiry are triggered only when a person's private affairs are disturbed or the person's home is invaded. [*State v.*]*Carter,* 151 Wn.2d [118] at 126 [, 85 P.3d 887 (2004).] *State v. Surge*, 60 Wn .2d at 71.

It is disturbing a person's private affairs. to do a search where is known that the "suspect" has a written medical authorization, and where the only other known fact is the mere smell of marijuana. Once a physician provides the written authorization to use marijuana, the use of marijuana is a "private affair" included in the protection of the protection of the Washington Constitution. What can be more private than the use of a medication? Absent evidence that marijuana is being possessed for reasons other than medicinal use, the search here was a blatant violation of the Washington Constitution. There was no lawful authority as there was no probable cause and thus no valid warrant.

Even under the Fourth Amendment of the United States

Constitution, it would be an "unreasonable search" and violate that provision of the Bill of Rights.

2. Mr. Fry's condition meets the statutory requirement for a debilitating condition

In this case, the trial court did not even allow the defense to present the affirmative defense of medical use of marijuana at trial, having granted the State's motion *in limine* to exclude such evidence. The Court of Appeals upheld this determination.

The written documentation in this case states that the condition is "debilitating." Nothing in the Act requires the physician to describe in the document the exact nature of the underlying disease or condition.

A "qualifying patient means a person who:

(a) Is a patient of a [licensed] physician ...;

(b) Has been diagnosed by that physician as having a terminal or debilitating condition;

(c) Is a resident of the State of Washington at the time of such diagnosis;

(d) Has been advised by that physician about the risks

and benefits of the medical use of marijuana; and

(e) Has been advised by that physician that they may benefit from the medical use of marijuana.

RCW 69.51A.010(3)

The part at issue here, is that required by subsection (b), above. Mr. Fry's physician did state that he was treating Mr. Fry for "a terminal illness or debilitating condition as defined in RCW 69.51A.010." CP 8. The underlying medical documentation refers to Mr. Fry as having been kicked in the head three times by horses. And that he has low back pain, a tender back of neck, and an inflamed throat with difficulty swallowing. CP 11. Nothing in the statute requires that the physician provided documentation for the diagnosis. It is superfluous.

Debilitating conditions, under former RCW 69.51A.010(4) could include:

(a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or

(b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard

medical treatments and medications; or

(c) Glaucoma ...;

(d) Any other medical condition duly approved by the Washington State Medical Quality Assurance Board [commission] as directed in this chapter.

The Court of Appeals opinion discusses only part (4)(d). What the physician describes in the underlying documentation for Mr. Fry would arguably, at least, fall under part (4)(b), intractable pain. That is a reasonable inference from the symptoms described by the physician. But clearly the written statement says the doctor diagnosed a "debilitating" condition, and that should be all that is required. There is no reason to look behind the face of the written consent.

The statute, based on additional conditions approved by the Washington State Medical Quality assurance commission, has since been amended to include the following conditions:

(d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or
(e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or(f) Diseases, including anorexia, which result in

> nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications; ...
> RCW 69.51A.010 (4)

3. Conclusion

This Court should reverse the Superior Court and the Court of Appeals on the issue of the search, and order suppression of the evidence. In the alternative, the Court should hold that the Superior Court and Court of Appeals erred in not allowing Mr. Fry to present his affirmative defense of Medical Use of Marijuana, and reverse the conviction, and remand for a new trial.

Respectfully submitted,

Dated September 11th, 2008

_____/s/_____

William Edelblute

Attorney for Petitioner

WSBA 13808

Declaration of Service

I hereby certify that on the 11th day of September, 2008, I mailed a true and accurate copy of the foregoing Supplemental Brief of Petitioner to John Troberg, Prosecuting Attorney, 215 S. Oak St., Ste. 114, Colville, WA 99114-2862, and to Jason L. Fry, Petitioner, 850-I, Finley Gulch, Colville, WA 9914.

_____/s_____

William Edelblute

Attorney for Petitioner

WSBA 13808